APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

SARASWATI DASI (DEFENDANT No. 1) *v.* HORITARUN CHUCKERBUTTI AND ANOTHER (PLAINTIFFS) AND SRIRAM SHAHA AND OTHERS (DEFENDANTS).*

1889 *April* 26.

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. iii, art. 3—Suit by occupancy ryot to recover possession after dispossession by landlord —Question of title—Possessory suits—Bengal Act VIII of 1869, s. 27.

A suit by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord, in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, Sch. iii, art. 3, namely, two years from the date of dispossession.

It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869.

THE plaintiffs sued to recover possession of a *jote*, alleging in their plaint that their father, and they themselves after him, had been in possession of the *jote* until 1291 (1884); that the *jote* was a permanent and transferable one; and that they had acquired a right of occupancy, but the defendants had, in 1291, illegally dispossessed them. In the plaint their cause of action was alleged to have accrued from the year 1291; in their evidence they stated it to have arisen from Assar 1291. The suit was instituted on the 16th June 1886.

The defendants pleaded that the plaintiffs' father had relinquished the *jote*, and that the plaintiffs had not acquired a right of occupancy; they also pleaded that the suit was barred by limitation, having been instituted more than one year from the date of dispossession.

The Munsiff dismissed the suit on the ground of limitation, holding that the suit ought to have been brought within one year

* Appeal from Appellate Decree No. 1225 of 1888, against the decree of W. H. Page, Esq., Judge of Moorshedabad, dated the 24th of April 1888 reversing the decree of Baboo Bunkim Chunder Mitter, Munsiff of Kandi, dated the 27th of June 1887.

1889

SARASWATI DASI v. HORITARUN CHUCKERBUTTI.

from the dispossession, under s. 27, Bengal Act VIII of 1869, the period of one year having expired before the Bengal Tenancy Act (which repealed Bengal Act VIII of 1869) came into operation.

The Judge on appeal reversed this decision on the point of limitation, which is the only one material to this report. He said:

(1) "The Munsiff grounds his judgment chiefly on the decision of Sir Richard Garth, C.J., in the case of *Imam Buksh Mundul* v. *Momin Mundul* (1), but there is in my opinion an important difference between that case and the present one which the Munsiff has overlooked. In that case the plaintiffs sued, alleging that their father had been in possession of a certain *jote*, and that on his death the plaintiffs and other co-sharers succeeded to the *jote* and had been in possession until the time when they were illegally dispossessed by the landlord: the landlord apparently did not dispute the possession either of the plaintiffs' father or of the plaintiffs and their co-sharers, but alleged that the plaintiffs and their co-sharers had voluntarily relinquished the *jote*. In the present case the landlord denies that the plaintiffs were ever in possession, alleging that their father voluntarily relinquished possession: here is a distinct denial of the plaintiffs' title, and therefore under the rulings cited by the plaintiffs' pleader [*Joyunti Dasi* v. *Mahomed Ali Khan* (2), and *Basarut Ali* v. *Altaf Hosain* (3)], I am bound to hold that the ordinary rule of limitation applies, and that the suit is not barred by any special rule under the provisions of the former Rent Law."

From this decision the first defendant, Saraswati Dasi, appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Srish Chunder Chowdhry* for the appellant.

Baboo *Karuna Sindhu Mukerjee* for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

This is a suit brought by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord.

(1) I. L. R., 9 Calc., 280. (2) I. L. R., 9 Calc., 423.
(3) I. L. R., 14 Calc., 624.

1889

SARASWATI DASI v. HORITARUN CHUCKER-BUTTI.

Under the decisions of this Court, it is settled law that the suit could have been brought within twelve years from the date of dispossession, inasmuch as the title of the tenant was disputed and put in issue in the case. The matter which we are called upon to decide is whether this rule, which has been long in force in this Court, has been affected by the limitation prescribed in the Bengal Tenancy Act, sched. iii, art. 3. It is there enacted, that a suit to recover possession of land claimed by the plaintiff as an occupancy ryot must be brought within two years from the date of dispossession. Section 184 of the Bengal Tenancy Act declares that suits specified in sched. iii of the Act shall be instituted within the time prescribed in that schedule for them respectively. It seems to us that by this enactment, it was intended to provide for all suits to recover possession of land which might be brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff. There is nothing in the terms of the law to lead us to suppose that the Legislature provided only for suits of a possessory nature, such as were previously dealt with by s. 27 of Bengal Act VIII of 1869. There is no saving clause in the Bengal Tenancy Act in favour of suits which might have been brought under the law previously existing by occupancy ryots, to recover possession of lands of which they had been dispossessed. Consequently, we are of opinion that even if the plaintiff had twelve years or a portion of twelve years to bring this suit when the Bengal Tenancy Act came into operation, he was, by its operation, restricted to two years from the date of his dispossession. The cause of action, that is to say, the date of dispossession, has not been clearly stated by the plaintiff in his plaint. It is stated to be from the year 1291. In the evidence given, it is made more precise and stated to be from Assar 1291. It is contended by the plaintiff that the expression 'up to Assar 1291' necessarily implies, from the end of Assar, which would bring this suit within the period prescribed by the Bengal Tenancy Act; but this was clearly not so understood by the first Court, and we are not prepared to say upon this vague expression that the suit is not barred. It is rather for

1889

SARASWATI DASI v. HORITARUN CHUCKERBUTTI.

the plaintiff to show that his suit has been brought within time and in the absence of evidence to the contrary, we must take it that the dispossession took place from the commencement of Assar. In this view the suit would be barred. We accordingly dismiss the suit, setting aside the judgment of the lower Appellate Court, and restoring that of the first Court, with costs of this and the lower Appellate Court.

J. V. W. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Hill.

NILMONY SINGH DEO (DECREE-HOLDER) *v.* BIRESSUR BANERJEE AND OTHERS (JUDGMENT-DEBTORS).*

1889 *June* 17.

Civil Procedure Code, 1882, *s.* 230—*Application to transfer decree for execution—Application for execution of decree—"Granting" application, Meaning of—Issue of process.*

An application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the terms of s. 230 of the Code of Civil Procedure.

The "granting" of an application under that section includes the issue of process for execution of the decree.

THIS was an application for execution of a decree obtained on the 7th August 1875, in the Court of the Collector of Manbhoom. Between 1875 and 1887, applications were, from time to time, made in the Manbhoom Court for execution of the decree, in two of which applications some money was realized. On the 26th July 1887, the decree-holder applied to the Manbhoom Court for a certificate to enable the decree to be executed in the district of Burdwan. The decree having been transferred to the Burdwan Court, an application was made to that Court on 23rd May 1888, for the issue of a warrant of arrest against the judgment-debtor, and he was, under the provisions of s. 245*B* of the Civil Procedure Code (see s. 2, Act VI. of 1888), called upon to show cause why he should not be committed to jail in

*Appeal from Order No. 82 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of December 1888, affirming an order of Baboo Madhub Chunder Chuckerbutty, Subordinate Judge of Burdwan, dated the 16th of August 1888.

execution of the decree. The judgment-debtor objected that the execution of the decree was barred by lapse of time under s. 230 Civil Procedure Code, and the Subordinate Judge upheld this objection, and dismissed the application on that ground; and the Judge, on appeal, came to the same conclusion. The decree-holder appealed to the High Court on the grounds that the application of the 23rd May 1888 was in continuation of the application of the 26th July 1887; that no previous application had been made and granted under s. 230 of the Civil Procedure Code; and that therefore the execution of the decree was not barred under that section.

Mr. *Woodroffe* and Baboo *Upendro Chundra Bose* for the appellant.

Baboo *Rash Behari Ghose* and Baboo *Srish Chundra Chowdhry* for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

The decree in this suit was passed on the 7th August 1875. It was kept alive from that time until the 26th July 1887. On that date, an application for a certificate was made to the Deputy Collector of Manbhoom, the Court by which the decree was passed, to allow execution to be taken out in the Civil Court at Burdwan. The application, no doubt, was made in the form prescribed in s. 235, but the last column, clause (*i*), was necessarily vague in respect of the attachment of particular properties. The decree was sent for execution to Burdwan by a proceeding dated 13th April 1888, and was received on the 4th May following. Execution has been refused under s. 230 of the Code, it being found that more than twelve years have elapsed from the date of the decree, and that this matter fell within that section, inasmuch as a previous application had been made to execute the decree under s. 230, and had been granted. It is contended in second appeal by Mr. Woodroffe, first, that the application to the Deputy Collector of Manbhoom, dated 26th July, was an application to execute the decree within the terms of s. 230, and that the subsequent proceedings at Burdwan could only be properly regarded as proceedings in continuation

1889

NILMONY SINGH DEO v. BIRESSUR BANERJEE.

and in furtherance of that application. In our opinion, the application made at Manbhoom was not an application to execute the decree, but an application to send the decree for execution by a Court which alone was competent to execute it in the manner desired. The Court at Manbhoom could have no power to execute a decree at Burdwan. The law, in our opinion, contemplates that in such a case the Court which passed the decree is competent only to transfer it for execution in the manner directed by s. 224, but that the application for execution should be made to the Court which has jurisdiction to issue processes in order to enforce payment of the money decreed. We therefore regard the application of the 26th July 1887, as an application merely to transfer the decree for execution, and not an application for the execution of the decree itself. The District Judge relies upon the case of *Dewan Ali* v. *Soroshibala Dabee* (1) as explaining the meaning of the granting of an application to execute within s. 230. It is unnecessary for us to discuss this matter, and to consider whether it is, as found in that case, to be equivalent to admitting an application within the terms of s. 245, or something beyond that, because we have no doubt that it includes the issue of a process for execution of the decree. In this case we have had brought to our notice two instances in which such processes issued and money was realized in part satisfaction of the decree, so that it is clear that the applications to execute, which were applications before the present application, were granted within the terms of s. 230. The decree-holder may or may not have cause to complain of the delay in the transmission of the decree from Manbhoom for execution to Burdwan, but that is not a matter which is relevant in the case now before us. Section 230 of the Code of Civil Procedure permits of no extension of the term specified, except for reasons which do not apply to this case. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 8 Calc., 297.

Before Mr. Justice Prinsep and Mr. Justice Hill.

UMESH CHUNDER DUTTA AND OTHERS (DECREE-HOLDERS) *v.* SOONDER NARAIN DEO AND OTHERS (JUDGMENT-DEBTORS).[o]

1889 *June* 18.

Limitation Act, 1877, *art.* 179—*Application to take a step in aid of execution—Opposing application to set aside sale in execution of decree.*

The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of art. 179 of sch. ii. of the Limitation Act to take a step in aid of execution. The application contemplated by that article is an application to obtain some order of the Court in furtherance of the execution of the decree (1).

THIS was an application for execution of a decree, dated 8th March 1877. The only question was whether or not execution was barred by lapse of time. The previous proceedings in execution, so far as they are material, were as follows:—

On the 26th June 1883, up to which time the decree had been kept alive, an application was made to execute it, and on the 17th August 1883, an order was passed for the issue of proclamation of sale of certain property which had been attached. On the 21st November, the sale of the property took place. On the 14th December 1883, the judgment-debtors applied that the sale should be set aside on the ground of irregularity, and on the same day an order was made to serve notice on the decree-holders, the 19th of December being fixed for hearing the application. On that day the application was heard, the decree-holders appearing by pleader, and opposing the application, but it was allowed, and the sale set aside.

The next application was filed on the 7th December 1886 but this, after various orders had been made upon it, was struck off for default. The present application was made on the 21st May 1888, within three years of the last previous application of 7th December 1886. To support the decree, however, it became necessary to show that the application of

[o] Appeal from an Order No. 96 of 1889, against the order of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 17th of December 1888, affirming an order of Baboo Bhuban Mohan Gangulí, Munsiff of Midnapore, dated the 18th of August 1888.

(1) See *Shib Lal* v. *Radha Kishen*, I. L. R., 7 All., 898.

1889

UMESH CHUNDER DUTTA v. SOONDER NARAIN DEO.

7th December 1886 was not barred, and for this purpose it was now contended that the period of three years should be calculated from the appearance of the decree-holder by pleader on the 19th December 1883, and that that opposition was an application to take some step in execution of the decree within art. 179, sch. ii of the Limitation Act. Both the lower Courts held that execution of the decree was barred.

The decree-holders appealed to the High Court.

Baboo *Nilmadhab Sen* for the appellants.

Baboo *Umbica Charan Bose* and Baboo *Umakali Mukerjee* for the respondents.

The following cases were referred to:—*Radha Prosad Singh* v. *Sundur Lall* (1), *Kewal Ram* v. *Khadim Hosain* (2), *Kristo Coomar Nag* v. *Mahobat Khan* (3), *Rajkumar Banerjee* v. *Rajlakhi Dabi* (4), and *Shib Lal* v. *Radha Kishen* (5).

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

The lower Courts have concurrently held that this application to execute is barred by limitation.

The appellants' pleader contends that the application is within three years, inasmuch as it was within three years from the date of the appearance of his pleader to oppose an application made by the judgment-debtor to set aside the sale held in execution. We agree with the lower Court that the appearance of the pleader to oppose the proceedings taken by the judgment-debtor cannot properly be regarded as an application within the terms of art. 179 to take some step in aid of execution. It seems to us rather that the application, contemplated by that article of the Limitation Act, is an application to obtain some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as any such application. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 9 Calc., 644. (2) I. L. R., 5 All., 576,
(3) I. L. R., 5 Calc., 595. (4) I. L. R., 12 Calc., 441.
(5) I. L. R., 7 All, 898.